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No. 85-521

In the Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

STATE OF CALIFORNIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANTS

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Because appellees either misstate or misunderstand our arguments, our basic submission bears restating. In our view, the district court erred for several independent reasons in holding that California's Section 418 agreement is property that was "taken" by the 1983 amendment. The court was mistaken, at the outset, in holding that Section 418 agreements are enforceable in the same manner as ordinary commercial contracts (see Gov't Br. 17-23). The court also failed to recognize that – even if Section 418 agreements do create vested rights – those rights were not disturbed when Congress exercised its reserved prerogative to enroll the states in the Social Security System (Gov't Br. 23-32); if vested rights were disturbed, moreover, the congressional action did not rise to the level of a taking (Gov't

Br. 42-45). And the court did not take note of the principle that Congress's authority to legislate for the public welfare cannot be contracted away (Gov't Br. 32-41). Appellees' responses to these points will be discussed in turn.

1. Appellees' principal contention appears to be that California's Section 418 agreement looks so much like a contract that it must be one (POSSE Br. 14-18; California Br. 11-13, 16-20; Council of State Governments (CSG) Amici Br. 13-16). In reaching this conclusion, appellees point to a number of factors: that the agreement was reduced to writing, and was signed by representatives of the state and federal governments; that the mutual undertakings described by the agreement were supported by "consideration"; that the agreement was entered into voluntarily;[1] and that California specifically bargained for inclusion in the agreement of a termination provision. Whether appellees have described these factors accurately may be questioned.[2] But even granting appellees' assertion that the Section 418 agreement resembles a contract, the legal import of that document is considerably less than the sum of its parts.

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[1] California asserts that Congress enacted Section 418 because it "believed that the states could not be subjected to a social security tax" (Br. 13 (footnote omitted)). This is an overstatement. In fact, there was *uncertainty* about the authority of the federal government to tax the states. See Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 2d Sess., *WCMP: 97-32, Termination of Social Security Coverage for Employees of State and Local Government and Nonprofit Groups* 5 (Comm. Print 1982). Participation in the System was made voluntary so that Social Security coverage could be extended quickly, thereby avoiding " 'political barriers posed by employers concerned with tax treatment issues (i.e., perceived constitutional prohibitions against mandatory taxation of State and local governments * * *).' " *Id.* at 2-3.

[2] Appellees' suggestion that California bargained for the inclusion of a termination provision in its Section 418 agreement, for example, is misleading. See POSSE Br. 16 (describing the termination clause as

The arrangement described by appellees reduces to a simple relationship: Section 418 created a cooperative federal-state program that permitted the states to enroll their employees, and those of local governments, in a nearly universal social welfare program; Section 418 also provided that the terms of state participation were to be memorialized in written form. This arrangement is no different in kind from a host of other programs in which the federal and state governments cooperate to provide benefits to individuals. And as we explained in our opening brief (at 18-19), "[u]nlike normal contractual undertakings," programs of this sort "originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." *Bennett* v. *Kentucky Department of Education,* No. 83-1798 (Mar. 19, 1985), slip op. 12. The 1983 amendment of Section 418 thus involved not a repudiation of a contract, but a modification of that controlling congressional judgment.

Appellees have offered no reason to believe that Section 418 agreements differ from other cooperative programs in a way that would lead to the creation of conventional contractual arrangements. CSG Amici (Br. 16) cites only *Pennhurst State School* v. *Halderman,* 451 U.S. 1, 17 (1981), for that proposition, but nothing in *Pennhurst* suggests that Congress lacks the authority to modify prospectively the conditions governing state participation in federal welfare programs. For its part, POSSE (Br. 14) notes that Social Security is not a cash grant program of the sort at issue in *Kentucky Department of Education*—

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an "obvious *quid pro quo*" for the congressional reservation of amendment authority); California Br. 30 (the "State's right in this case was acquired through negotiation as part of the consideration for the contract"). In fact, the "contractual" termination clause simply tracked the termination provision contained in the 1950 version of the Act. California could not have negotiated a different kind of termination provision, and inclusion of this clause in the agreement added absolutely nothing to the statutory rights granted California by the pre-1983 version of Section 418(g).

but it fails even to attempt to explain why this distinction supports the conclusion that Section 418 created vested rights.

Indeed, the basic flaw in appellees' argument is demonstrated by their concession (POSSE Br. 23-25; California Br. 24, 28; CSG Amici Br. 19-20, 25) that Congress retains the authority to modify the System in such a way as to require the states to participate in Social Security—even though that type of modification would render the outstanding Section 418 agreements nugatory. Appellees thus acknowledge that whatever rights are created by Section 418 agreements cannot survive a legislative modification of the System. This surely is an implicit recognition that the program at issue here is one that "remain[s] governed by statutory provisions expressing the judgment of Congress"; rights that are so easily swept away can hardly be deemed "vested."

2. This leads to a second obvious flaw in appellees' position. Even if Section 418 agreements are contracts, appellees acknowledge that there could have been no constitutional objection had Congress disregarded those agreements altogether and required permanent state participation in the System simply by enacting new legislation to that effect. But appellees insist that the 1983 amendment is invalid because, while it accomplished precisely that result, it did so by making the existing agreements nonterminable (POSSE Br. 24-25; California Br. 24; CSG Amici Br. 19-20). While their reasoning on this point is difficult to grasp, appellees appear to contend that the *form* of the 1983 amendment amounted to a repudiation of existing contracts rather than a modification of the System, and that the amendment should be deemed improper for that reason.

This distinction, however, is so exceedingly fine as to be entirely without substance. The effect of legislation using language acceptable to appellees would have been identical

to the actual effect of the 1983 amendment: both types of legislation would require the continued participation in the System of currently enrolled state and local government employees.[3] Yet as we explained in our opening brief (Gov't Br. 29-32), congressional legislation cannot be challenged on the ground that it uses the wrong verbal formulation. The Court has thus flatly rejected the argument that, "in a statute such as this, regulating purely economic matters, * * * Congress' choice of statutory language can invalidate the enactment when its operation and effect are clearly permissible." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 23-24 (1976). See also *United States* v. *Ptasynski*, 462 U.S. 74, 84, 86 (1983). Appellees evidently have no answer to this principle, for neither they nor amici CSG so much as cite the Court's decision in *Turner Elkhorn Mining*, let alone attempt to distinguish it.

The only rationale offered by appellees in support of their assertion that the form of the 1983 amendment affects its constitutionality is their vague suggestion (POSSE Br. 28; CSG Amici Br. 25-26) that the Constitution is concerned with process as well as with substance. But appellees do not contend that they were due any sort of "process," as that term is normally understood, prior to Congress's enactment of the 1983 amendment. In any event, as *Turner Elkhorn Mining* demonstrates—in the context of a case that specifically addressed the Fifth Amendment's Due Process Clause (see 428 U.S. at 23)[4]—Congress's choice of one verbal formulation rather than another does not implicate any value protected by the Constitution.

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[3] Indeed, the only difference between the two forms of legislation is that the one chosen by Congress is *more* accommodating to the states; it leaves the individualized Section 418 agreements largely intact.

[4] It should be noted that this case does not involve the Fifth Amendment's Due Process Clause. Because states are not "persons" within the meaning of that Clause (see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966)), California may not advance a due process

3. Even if California's Section 418 agreement is a contract, appellees can prevail only if the 1983 amendment effected a taking of their property rights. Appellees apparently recognize this, acknowledging (California Br. 29-30; CSG Amici Br. 21-22; see POSSE Br. 34-35) the relevance of the three-part takings analysis repeatedly used by the Court (see Gov't Br. 42-43) and recently restated in *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986), slip op. 13.

Appellees nevertheless devote virtually their entire discussion of takings law to a description of the financial impact of the 1983 amendment on California. Yet the Court has made it clear that even a profound economic effect, standing alone, does not render governmental action a taking. See, *e.g.*, *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 131 (1978); *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915). And appellees do not deny that California retains the principal benefit that induced it to enter into its Section 418 agreement—participation in the System.[5] The federal government is thus not abrogating a contract provision without continuing to provide substantial benefits in return; rather, the government in requiring states to leave their employees in the System is benefitting 115 million workers by maintaining an equitable nationwide social insurance program to help alleviate the problems caused by old age and disability.

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claim. And as we have explained elsewhere (see J.S. 9-10 n.9), the POSSE plaintiffs do not have standing to challenge the 1983 amendment. The district court, in any event, considered only the Taking Clause.

[5] POSSE maintains (Br. 34-35) that its entire property right in the termination provision was destroyed by the 1983 amendment, so that the legislation necessarily effected a taking. But if there is a property interest involved here, it plainly is the entire Section 418 agreement; surely, a termination provision is meaningless unless it is attached to something that can be terminated. And the Court has made it clear

Appellees largely fail, moreover, to discuss the other two takings criteria deemed relevant by the Court—the character of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. This failure is not surprising. Appellees obviously are unable to point to any physical invasion or permanent appropriation of property, the type of action that is the paradigm of a taking. See *Connolly*, slip op. 13. And they have identified no investment-backed expectations that were inspired by a belief that they had a permanent prerogative to withdraw from the System. Indeed, given appellees' concession that Congress retained the right to require the states to participate in the System at any time, any expectations grounded on such an investment could hardly have been reasonable (see Gov't Br. 45).

Against this background, as we explained in our opening brief, it cannot be said that "fairness and justice" require the invalidation of the 1983 amendment. *Connolly*, slip op. 15. As the Court recently reiterated, "[t]he purpose of forbidding uncompensated takings of property for public use 'is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Ibid.* (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). Plainly, appellees here are not being asked to

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that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979). Indeed, as we explained in our opening brief (Gov't Br. 20, 44), the termination provision received little attention when the Section 418 program was created, apparently because it was assumed that few employers would wish to withdraw from the System. POSSE nevertheless maintains (Br. 30-31) that the prerogative to withdraw had a significant effect in inducing *local government employers* to seek, through their states, to join the System. But the district court made no findings on that point. And it is not, in any event, the expectations of local governments that are significant; the pre-1983 version of Section 418—and the Section 418 agreement at issue here—gave only the state itself the prerogative to withdraw from the System.

shoulder a burden which rightfully should be taken on by the public. Indeed, to the extent that it would permit vested employees to receive Social Security benefits while being relieved of any obligation to pay into the System, the district court's ruling would force the government to shift a public burden onto *employees* who remain in the System. In the 1983 amendments, Congress simply directed appellees to share the burden borne by most of the nation's employers and employees.

4. A final issue in this case involves the enforceability of contracts that purport to bind Congress not to exercise its sovereign powers for the general welfare. Given appellees' concession that Congress retained the authority to require the states to participate in the System despite the existence of the Section 418 agreements, there is no need for the Court to reach this question. Because appellees have misstated the basis of the 1983 amendment, however, a brief discussion of the issue is in order.

Quoting *Lynch* v. *United States*, 292 U.S. 571 (1934); *Perry* v. *United States*, 294 U.S. 330 (1935); and the *Sinking-Fund Cases*, 99 U.S. 700 (1878), appellees spend considerable time (POSSE Br. 17, 27; California Br. 14-15; CSG Amici Br. 17-18) establishing that a sovereign may bind itself contractually. That proposition undoubtedly is correct, so far as it goes. But appellees nowhere deny the repeated holdings of this Court (see Gov't Br. 32-35)—reiterated in *Lynch* itself (see 292 U.S. at 579, 580)—to the effect that contracts obligating the United States not to legislate for the general welfare are unenforceable, so long as the legislation at issue was intended to do more than simply save money by baldly repudiating government obligations.[6]

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[6] The Court has explained that "the exercise of the police power cannot be limited by contract for reasons of public policy" (*Northern Pac. Ry.* v. *Minnesota ex rel. Duluth*, 208 U.S. 583, 598 (1980)); every contract with the state thus is "made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power." *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 108-109 (1938). The outcome in *Lynch* turned on the Court's conclusion that, when Congress repudiates contracts simply to reduce expenditures, the abrogation does not involve "the exercise of the police or any other power" (292 U.S. at 580). See Gov't Br. 36-37.

Instead, appellees insist that the 1983 amendment was not designed to advance the general welfare; they maintain that the amendment, like the challenged legislation in *Lynch*, was motivated by a simple desire to bolster the federal fisc (POSSE Br. 29-30; California Br. 25-27; CSG Amici Br. 20). This assertion, however, is demonstrably inaccurate. As a whole, the Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 *et seq.*, may have been enacted to preserve the solvency of the System. See H.R. Rep. 98-25, 98th Cong., 1st Sess. Pt. 1, at 11-13 (1983). But nowhere in its discussion of the legislation specifically at issue here did Congress suggest that Section 418(g) was amended for fiscal reasons.

To the contrary, as we explained in considerable detail in our opening brief (Gov't Br. 38-41), Congress acted to protect the interests of state and local government employees while preserving public confidence in the System as a whole. Congress found that when employers withdrew from the System, short-term employees were deprived of the protections of Social Security despite having made payments into the System.[7] Employees whose rights already had vested, meanwhile, obtained a windfall. And lower-wage employees who were withdrawn from the

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[7] Appellees (POSSE Br. 31) assert that localities that wish to deprive their employees of Social Security coverage are not acting irresponsibly because "many if not most California local government entities have carried double coverage." We are aware of no record evidence to support this contention. More importantly, the legislative history demonstrates that Congress was concerned about those governmental workers in California or elsewhere who are *not* "double-covered," and who therefore would be left without social insurance were they de-

System found it difficult to obtain comparable pension protections elsewhere. The 1983 amendment was intended to cure these defects in the System, while curbing resentment on the part of employees who continued to participate in Social Security and who found themselves inheriting the tax burden of workers whose rights already had vested.

When a Fifth Amendment challenge is brought against legislation of this sort—which manifestly is designed to accomplish a broad social good—cases such as *Lynch* are simply inapposite.[8] If California's Section 418 agreement could somehow be construed to constrain Congress's authority to enact the 1983 amendment, then, the agreement would be unenforceable.

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prived of Social Security. The back-up coverage provided by a state or private pension plan, moreover, is unlikely to match that offered by Social Security. See Gov't Br. 39-41. Similarly, amici note (CSG Br. 22) that "[o]ne may reasonably question whether [it is] good social policy" for a locality to eliminate its workers' Social Security coverage to save money, but assert that states should not be required to pay for the coverage of employees who wish to withdraw from the System. As we explained in our opening brief (Gov't Br. 6. n.6), however, the pre-1983 version of Section 418 permitted states to withdraw from the System without consulting affected employees. As a result, there is no way of knowing whether the employees whose coverage is at issue in this case actually wish to surrender the protections of Social Security.

[8] Appellees also acknowledge that, even in cases where the challenged legislation is motivated entirely by the sovereign's fiscal self-interest, the Due Process Clause does not bar the government from abrogating a contract when the legislation is both " 'reasonable and necessary to serve the * * * purposes claimed by the State.' " CSG Amici Br. 24 (quoting *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 29 (1977)). See POSSE Br. 36-37. While the Court has suggested that a less rigorous standard may govern due process challenges to federal legislation (see *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, No. 83-1492 (Mar. 18, 1985), slip op. 20), it is plain—if the Due Process Clause is relevant here at all (see note 4, *supra*)—that the 1983 amendment more than meets even appellees'

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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APRIL 1986

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test. In enacting the amendment, Congress intended to protect workers whose rights had not yet vested in the System while precluding windfalls for employees whose rights had vested. It is difficult to imagine a more effective or precisely tailored means of accomplishing this purpose than the one chosen by Congress. Including only new state employees in the System, as appellees propose (POSSE Br. 38), would not have cured the problems identified by Congress. And including *all* state and local government employees, a course also suggested by appellees (see POSSE Br. 37-38; CSG Amici Br. 25), would have been a more drastic response, which would have effectively abrogated not only the termination clause but also every other provision of the Section 418 agreements.

U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20196